80-1411

No.

Office-Supreme Court, U.S.
FILED
FEB 20 1981
ALEXANDER L. STEVAS,
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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,

Respondent,

vs.

ROGER S. BASKES,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A. Should This Court Set Procedures Requiring The Disclosure Of The Nature And Scope Of The Prosecution's Intended Cross-Examination Of A Defendant's Proposed Character Witnesses?

B. Can A Government Agency Obtain Inculpatory Evidence Against An Attorney By Committing An Intentional Illegal Search And Seizure Against His Client And Thus Circumvent The Constitution's Guarantee Of Due Process Of Law?

C. Should This Court Reconsider Its Decision In *United States* v. *Payner* Which Engrafted An Unprecedented Standing Requirement Upon A Federal Court's Supervisory Powers?

INDEX

	PAGE
Questions Presented	i
Authorities Cited	iv
Opinion	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statement Of The Case	2
The Manner In Which The Federal Constitutional Claims Were Raised	4
Reasons For Granting The Writ	6
Conclusion	12

Appendix—

A. United States v. Baskes, Slip Op. 77-2178 (7th Cir. September 18, 1980) ..... App. 1

B. Order denying Petition for Rehearing dated December 23, 1980 ..... App. 20

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AUTHORITIES CITED

Cases

PAGE

Gross v. United States, 394 F.2d 216 (8th Cir. 1968), on appeal after new trial, 416 F.2d 1205 (8th Cir. 1969), *cert. denied,* 397 U.S. 1013 8

Michelson v. United States, 335 U.S. 469 7

Mullins v. United States, 487 F.2d 581 (8th Cir. 1973) 8

United States v. Baskes, Slip Op. 77-2178 (7th Cir. September 18, 1980) 1

United States v. Baskes, No. 80-1066, October Term, 1980 .....10, 11

United States v. Cook, 608 F.2d 1175 (9th Cir.), *reh. en banc,* 608 F.2d 1186 (9th Cir. 1980) 8

United States v. Lewis, 482 F.2d 632 (D.C. Cir. 1973) .. 8

United States v. Ming, 466 F.2d 1000 (7th Cir.), *cert. denied,* 409 U.S. 915 (1972) 8-9

United States v. Oakes, 565 F.2d 170 (1st Cir. 1977) 8

United States v. Payner, 65 L.Ed.2d 468 (No. 78-1729, June 23, 1980) 4

United States v. Payner, —— U.S. —— 5, 10

Other Authorities

United States Constitution Amendment V 2, 9, 10

28 U.S.C. §1254(1) 1

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I.
OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported; *United States* v. *Baskes,* Slip Op. 77-2178 (7th Cir. September 18, 1980). That opinion is filed with this Court as Appendix A.

II.
JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered on September 18, 1980. On October 2, 1980 a petition for rehearing en banc was filed. The Seventh Circuit denied the petition for rehearing en banc on December 23, 1980. This Court's jurisdiction is envoked under 28 U.S.C. §1254(1).

III.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

IV.

STATEMENT OF THE CASE

Roger S. Baskes, a practicing attorney specializing in federal income taxation and estate planning, was charged in a one count indictment with conspiring to defraud the United States "by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service . . . in the ascertainment, computation, assessment and collection of the revenue, to-wit: income taxes and gift taxes." Two other attorneys and a real estate investor were initially named as co-conspirators. Two of the defendants were severed and the indictments subsequently dismissed. The jury returned a verdict acquitting one attorney-defendant, but finding Baskes guilty.

The substance of the proceeding involved the sale of an office apartment complex in Reno, Nevada, a gold mining claim and the estate planning for its principal owner,

John Cavanaugh. As part of a desire to use the sale of this complex as an estate planning vehicle, Cavanaugh and Baskes discussed the use of sale and leasebacks, domestic trusts, holding companies, foreign trusts and other tax savings, tax deferment and estate planning concepts. While the government conceded the legitimacy of each such tax planning procedure, the crux of its case centered around the valuation of the Nevada gold mining claim owned by Cavanaugh. The prosecution agreed that if the mining claim valuation was as set forth, then the tax plan of sale was proper and the use of the various entities, transfers and planning concepts was also proper. Both parties offered expert geologist testimony concerning the fair market value of the claim during the period in question. In addition, the defense offered evidence of substantial escalation in the prices of mining claims, oftentimes reaching hundreds of thousands of dollars, and such was acknowledged by the prosecution. Evidence was also presented that Cavanaugh was cautioned by the defendant that he would have to support the valuation of the mine, that Cavanaugh was experienced in mining claim purchases, and that he acknowledged full responsibility for the valuation of the mine in all deeds and title transfers thereto. Cavanaugh even ordered a press clipping service to keep track of the incredible increase in mining claim values, again in an effort to substantiate the value.

While not charged in the indictment, the government was permitted to offer substantial evidence concerning the mining claim and other unrelated entities after the Cavanaugh transaction was completed.

Baskes filed a detailed motion to suppress relating to the acquisition of Bahamian banking records by the Internal Revenue Service through theft, bribery and subornation of foreign officials. The suppression motion was prem-

ised on several distinct grounds, including: (1) that it had been obtained in an illegal and unconstitutional manner and must be suppressed pursuant to the court's supervisory powers; and (2) that the use of such illegally obtained evidence would violate his constitutional right to due process of law. The district court stayed its decision until after trial. Subsequent to the finding of guilty, a hearing on the motion to suppress was held and Judge Decker denied the motion to suppress. Baskes was then sentenced to two years in prison.

Baskes timely filed his appeal to the United States Court of Appeals for the Seventh Circuit and oral argument was held in April, 1978. Subsequent to oral argument, but prior to any written opinion by the Seventh Circuit, the Supreme Court rendered its decision in *United States* v. *Payner,* 65 L.Ed. 2d 468 (No. 78-1729, June 23, 1980), holding that evidence obtained through bad faith illegal conduct against a third party could not be suppressed at a taxpayer's trial for income tax offenses. Though Roger Baskes was attorney for the bank whose records were stolen in *Payner,* the Seventh Circuit in September, 1980 held *Payner* dispositive of the suppression issue pending in this case. In addition, the Seventh Circuit's opinion affirmed the conviction despite other substantial issues of law raised in the appeal.

V.

THE MANNER IN WHICH THE FEDERAL CONSTITUTIONAL CLAIMS WERE RAISED

Petitioner first asserted the Fifth Amendment by making a pretrial motion to suppress government evidence as being illegally obtained in violation of his right to due process of law. Petitioner also urged that the evidence be suppressed under the court's supervisory powers and

the Fourth Amendment. The district court stayed its decision on the motion until after trial. Following a trial on the merits, petitioner renewed his motion to suppress. The district court, however, denied the motion to suppress after hearing. Petitioner then appealed the district court's order to the United States Court of Appeals for the Seventh Circuit. Following this Court's decision in *United States* v. *Payner*, ... U.S. ....., the Seventh Circuit affirmed the district court's order and on December 23, 1980 denied the petition for rehearing en banc.

VI.

REASONS FOR GRANTING THE WRIT

A. THE COURT SHOULD SET SPECIFIC PROCEDURES CONCERNING THE DISCLOSURE OF THE NATURE AND SCOPE OF THE PROSECUTION'S CROSS-EXAMINATION OF A DEFENDANT'S PROPOSED CHARACTER WITNESSES.

Petitioner requests this Court to adopt a rule requiring the prosecution upon a motion in limine to disclose any alleged fraudulent acts it intends to use on cross-examination of the defendant's character witnesses under the guise of "have you heard" questioning. The rule should be premised on the fact that prior to the witness' testimony the defense set forth a full disclosure of his character witnesses' direct examination. This rule would eliminate another means of gamesmanship which relegates the defendant to a Hobson's choice of either foregoing character evidence or run the risk of government questioning on cross-examination concerning some undisclosed alleged "have you heard" acts of misconduct.

After the close of the prosecution's case, petitioner moved in limine for the district court to conduct a hearing outside the presence of the jury to ascertain whether the government would attempt to cross-examine his character witnesses concerning alleged specific acts of misconduct which previously had been inferred. In a pretrial memorandum the government had asserted that character witnesses "may be cross-examined as to whether they heard of particular instances of conduct pertinent to the trait [about which the character witness testifies]." The pretrial memorandum, however, made no mention of the al-

leged "particular instances of conduct" which would be the subject matter of cross-examination. As part of his motion, petitioner fully advised the district judge of the *entire* scope of his intended direct examination: that the character witnesses would be asked if they knew Baskes during the years 1969, 1970 and 1971, in what respect they knew him and whether they knew of and what was Baskes' reputation for honesty and integrity in the community during those years. Having done so, the defendant requested the court to elicit from government counsel the purported specific acts of misconduct to which they had earlier referred. Accepting such premise, the district court sought disclosure from the government but the prosecution evaded such inquiries and refused to make such a disclosure. The prosecutor merely responded that he intended to ask the character witnesses whether they were aware of other unspecified alleged fraudulent acts by means of "have you heard" questioning and proposed that he would *not* offer any evidence to prove such allegations. While the district court expressed its own concern that the jury would be left with the impression that these events had in fact occurred, it, nevertheless, disregarded such concerns and refused to conduct any further inquiry, directing the defense to put on his character witnesses at his own risk and ruled that the court would decide the question after the direct testimony. Faced with this dilemma, the defense offered no character testimony.

This Court has not considered the important procedure and scope of character testimony since its foundation opinion of *Michelson* v. *United States,* 335 U.S. 469, wherein the district courts were cautioned to acknowledge their "heavy responsibility . . . to protect the [have you heard] practice from any misuse." The Seventh Circuit's procedures are in apparent conflict with the procedures set

forth in *United States* v. *Lewis,* 482 F.2d 632 (D.C. Cir. 1973) and the Eighth Circuit's divergent opinions in *Mullins* v. *United States,* 487 F.2d 581 (8th Cir. 1973) and *Gross* v. *United States,* 394 F.2d 216, 223 (8th Cir. 1968) *on appeal after new trial,* 416 F.2d 1205 (8th Cir. 1969), cert. denied, 397 U.S. 1013. Furthermore, recent trends of decision encourage motions in limine in other areas, including prior to a defendant's testimony, in order to avoid "trial by ambush." *United States* v. *Cook,* 608 F.2d 1175 (9th Cir.) *reh. en banc,* 608 F.2d 1186 (9th Cir. 1980). In *Cook,* fourteen judges of the Ninth Circuit specifically concluded that prior to a defendant taking the stand, pursuant to a motion in limine, the government must disclose any and all prior convictions it intends to use for impeachment purposes and the court must rule on the propriety of the use of such convictions at that time. The rule is premised on the defendant establishing on the record (1) that he will take the stand and testify if the prior convictions are excluded, and (2) that he sufficiently outline the nature of his testimony. While not adopting an absolute per se rule, the First Circuit has also strongly encouraged the use of motions in limine and ruling thereon in advance of actual testimony, whether during pretrial proceedings, at the close of the government's case, or before the defendant or other affected witness takes the stand. *United States* v. *Oakes,* 565 F.2d 170, 172 (1st Cir. 1977).

The importance of character evidence in this case cannot be questioned. Baskes was a practicing lawyer with an excellent reputation and stood ready to present substantial character evidence on his behalf. Baskes would have been entitled to a jury instruction that the character evidence alone could create a reasonable doubt of his guilt. *United States* v. *Ming,* 466 F.2d 1000 (7th

Cir.), cert. denied, 409 U.S. 915 (1972). The specific charge related to Baskes' legal practice and the character traits at issue. The character evidence rose to even greater import in view of the prosecution's repeated references and heated arguments on alleged similar act type evidence. Thus, the government clearly attempted to question the defendant's character without the defense being able to produce significant character evidence on his own behalf.

The Seventh Circuit has refused to follow other Circuits' use of motions in limine. This Court now has an opportunity to set forth the procedural guidelines to be used in considering motions in limine in character evidence cases as well as in other related areas of law. The only disadvantage to the use of such procedure is to eliminate "trial by ambush" and gamesmanship while further enhancing the jury's function in its search for truth.

B. TO DETERMINE WHETHER AN ATTORNEY WHO IS THE TARGET OF A GOVERNMENT INVESTIGATION HAS STANDING TO SUPPRESS EVIDENCE ILLEGALLY SEIZED FROM HIS CLIENT ON THE GROUNDS THAT ITS USE AGAINST THE ATTORNEY WOULD VIOLATE HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

The Internal Revenue Service was conducting an investigation of offshore tax havens. Included among their targets were Castle Bank and Trust (Bahamas), petitioner and his law firm, which represented the bank. As part of that investigation, Internal Revenue Service agents broke into an apartment and stole the briefcase of Michael Wolstencroft, an officer of the bank. The purpose of the Internal Revenue Service search and seizure was to obtain inculpatory evidence against the bank's attorney, petitioner. The

government obtained information relating to the instant prosecution which was derived from the seized material. The charges pertained to tax advice given by petitioner to another of his clients. Petitioner urged that the constitutional guarantee of due process of law prohibited the use of the product at his trial.

In *United States* v. *Payner*, ... U.S. ....., this Court held that a federal court, utilizing its own supervisory powers, could not suppress evidence illegally seized in the manner set forth above on the basis of a defendant's Fourth Amendment rights or its own supervisory powers. This Court, however, was neither presented with, nor resolved the issue of, whether such evidence should be suppressed to assure the defendant's Fifth Amendment right to due process of law. In a related proceeding, a petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit has been filed specifically raising this issue. *United States* v. *Baskes*, No. 80-1066, October Term, 1980. To date, the Supreme Court has not yet ruled on whether or not to grant such petition. The petitioner herein reasserts the reasons for granting the writ as set forth in his related petition and should the Court grant his petition for certiorari in such proceeding, the petitioner requests that this petition similarly be granted as containing an identical issue.

C. UNLESS THE HOLDING IN UNITED STATES v. PAYNER IS RECONSIDERED, THE UNITED STATES COURTS WILL BECOME UNWILLING ACCOMPLICES IN THE PERPETRATION OF UNLAWFUL ACTS OF GOVERNMENT AGENCIES.

This Court should reconsider the holding in *United States* v. *Payner* and confirm specific standards for the exercise of supervisory powers. Otherwise, *Payner* will

stand as an imprimatur to Executive abuse in the ostensible enforcement of the law. In *Payner,* this Court abdicated *any* supervisory control over the Executive Branch solely on the ground that a third party was the object of the government's criminal conduct, even though the *exclusive* reason for such bad faith criminal conduct was to obtain evidence for use in the courts. This Court has a duty to protect the integrity of the federal judicial system and deter bad faith law enforcement and, thereby deny the government fruit of its conscious criminal conduct. In no other way can the administration of justice be protected from the Machiavellian attitude that government criminal conduct should be rewarded.

As previously noted, in a related proceeding a petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit has been filed specifically raising this issue. *United States* v. *Baskes,* No. 80-1066, October Term, 1980. To date, the Supreme Court has not yet ruled on whether or not to grant such petition. The petitioner herein reasserts the reasons for granting the writ as set forth in his related petition and should the Court grant his petition for certiorari in such proceeding, the petitioner requests that this petition similarly be granted as containing an identical issue.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-2178

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ROGER S. BASKES,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76-CR-585—Bernard M. Decker, *Judge.*

Argued April 28, 1978—Decided September 18, 1980

Before FAIRCHILD, *Chief Judge,* MARKEY, *Chief Judge,** and BAUER, *Circuit Judge.*

FAIRCHILD, *Chief Judge.* Defendant-appellant Roger S. Baskes was charged in a one-count indictment with conspiring with others to defraud the United States by impeding and obstructing the assessment and collection of

* The Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

income and gift taxes by the Internal Revenue Service. After a jury trial, defendant was found guilty. Kanter, who was tried with Baskes, was acquitted. The cases of other defendants were severed. Following a post-trial denial of the defendant's motion to dismiss the indictment or suppress allegedly illegally acquired evidence, defendant was sentenced to the custody of the Attorney General for a period of two years. This appeal followed. For the reasons hereinafter stated, we affirm.

I. *Background*

During late 1968 and 1969, Samuel Zell, a real estate investor, entered into negotiations for the purchase of the Arlington Towers, a twenty-two story office-apartment complex, and the adjacent Arlington Plaza, an eleven-story hotel built on top of a six-story garage. The Towers and the Plaza are located in Reno, Nevada. The Towers was owned by a partnership whose partners were John and Margery Cavanaugh (90%), their son John E. Cavanaugh, Jr. (5%), and Barbara and William Thornton, their daughter and son-in-law (5%). The garage and the Plaza were owned entirely by John and Margery Cavanaugh. While these negotiations were taking place, Zell was in repeated contact with his brother-in-law, Roger Baskes, a Chicago attorney specializing in federal income taxation and real estate planning. Zell advised the Cavanaughs that the tax ramifications of any sale could be handled by defendant Baskes' law firm. The parties then devised a highly complicated transaction which they claim would legitimately minimize the tax consequences of any sale as well as provide the Cavanaughs with a certain amount of cash after taxes.

Under the terms of the transaction structured by the defendant Baskes, $700,000 which was allegedly part of

the purchase price for the Towers and the Plaza was treated as the ultimate purchase price of a third asset owned by the Cavanaughs, the Hornet No. 2, a gold mining claim in the Manhattan, Nevada mining district. The parties, in August 1969, orally agreed to a plan whereby the Towers, the Plaza and the mining claim would be sold. A letter memorializing the prior oral agreement between Zell and Cavanaugh was prepared in November, 1969.

Pursuant to the plan, John Cavanaugh transferred the mining claim to Jeffrey Investment Company (Jeffrey) in exchange for all its preferred stock. Jeffrey was a shelf Nevada corporation already formed by Baskes' law firm. The common stock of Jeffrey was issued to Castle Trust Company, Ltd., Nassau, Bahamas, as Trustee of T-5088, the foreign trust held for the benefit of Cavanaughs' children. On liquidation of Jeffrey, in January 1970, Cavanaugh, Sr. would receive $10,000 in exchange for its preferred stock with ownership of the mining claim going to the foreign trust as common stockholder. In February, Zell, the buyer, deposited the $700,000 in T-5088 and the mining claim was then transferred to Zeno, N.V., a foreign affiliate of Castle Trust Co.[1] The claim was then trans-

[1] The parties disagree as to whether Zeno paid any consideration for the mining claim. It appears that the Cavanaughs assigned to Alan Hammerman, acting as trustee for Zeno, an option to purchase the Plaza for $290,000 cash plus the assumption of $2.4 million of mortgages. It is not clear whether Hammerman paid any consideration for this assignment. Hammerman then reassigned this option to Zell for $700,000. This $700,000 was paid by Zell to Castle Trust and deposited in T-5088 for Zeno's account. In exchange, the mining claim was transferred from T-5088 to Zeno. So, after the unraveling, Zell apparently paid $700,000 to T-5088 for the mining claim, and the mining claim was transferred to the possession of Zeno.

(footnote continued)

ferred to Hornet Mining, Inc., a newly formed corporation, in exchange for its stock. The Hornet Mining stock was then sold to a partnership called Tonopah Vein in which Fantasy-Galaxy, Inc. had a 99% stock interest and Buckeye Oil Co. had a 1% stock interest. Defendant Baskes' law firm was tax counsel to Fantasy-Galaxy and Baskes himself was a trustee and partner in Buckeye Oil. As a result of this transaction, Fantasy-Galaxy claimed a partnership loss on account of prepaid interest of $153,000. Finally, Fantasy-Galaxy was dissolved and all of its assets, including the mining claim, were transferred to Argosy Venture, a Bahamian partnership associated with Castle Trust.

The government presented the case on the theory that the defendant Baskes, Burton W. Kanter, Alan H. Hammerman, and Samuel Zell conspired together to structure the sale of the Towers and the Plaza in such a manner as to disguise and falsify the true tax consequences of the sale to the seller, John E. Cavanaugh, Sr. and family, by falsely treating $700,000 which was really part of the purchase price of the real estate and a part of the Cavanaugh gain, as if it were paid for the mining claim. The claim allegedly was worthless. The government argued that this scheme was carried out by a series of manipulations

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(footnote continued)

Zell, in April 1970 exercised the option to purchase the Plaza by paying the Cavanaughs $290,000 cash and assuming $2.4 million of mortgages. Earlier, in December of 1969, Zell apparently paid $10,000 cash and assumed $4.9 million in mortgages for the Towers. It appears, therefore, that Zell paid consideration worth approximately $8.4 million in exchange for the Plaza, Towers and mining claim. While it is not clear, it further appears that in 1969 the Cavanaughs sold the land under the Towers and Plaza for $700,000 which was then leased back to the Cavanaughs with an option to purchase. Zell had once offered $9.1 million for the Towers and Plaza.

through the use of corporate entities, corporate stock, foreign trusts, partnerships, backdated documents and ostensible transfers of ownership in order to conceal the true nature of the sale of the Towers and Plaza.

It is conceded by all parties that the transaction would not have defrauded the government had the mining claim actually been worth $10,000 originally and then appreciated to $700,000.[2] The mining claim was introduced into

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[2] If the mining claim was actually worth $10,000 at the time of the first exchange and then quickly appreciated in value to $700,000, the transaction would have been a variation of a common estate planning technique used in disposing of an asset which is expected to increase significantly in value. The asset (the mining claim) is transferred to a corporation in return for preferred stock equal to its current value. The common stock of the corporation is issued to the transferor's heirs or to a trust for cash in an amount equal to the value of the common stock. If the contributed asset holds or decreases in value, the transferor is protected, since on liquidation of the corporation he would receive all proceeds up to the stated value of the preferred stock. If however, the asset increases in value, all the benefits of such increase are realized by the holders of the common stock, since the transferor, as preferred stockholder, would only be entitled to receive the fixed redemption amount of his issued preferred stock. The value added asset is thus effectively removed from the transferor's estate with all growth potential held by his beneficiaries. Further, under the Internal Revenue Code, if the common stockholder were a foreign trust, no tax would be paid by such foreign trust on the sale of that capital asset after liquidation. 26 U.S.C. § 871. Such gain would be taxed only upon distribution to beneficiaries who were United States citizens. 26 U.S.C. § 662 (a)(2). Thus, the entire gain could be used by this foreign trust to earn income all of which would not be taxed until the USA distribution.

In this case, however, the value of the mining claim was disputed and the jury could find that it was worthless. In this event, the transaction would no longer be legitimate. It would be only a sham device to hide $700,000 of the price actually received for the real estate and a gift to the younger Cavanaughs.

the transaction, according to the government, because unfavorable tax consequences due to depreciation recapture would have resulted in the Cavanaughs being unable to recover their cash investment had the Towers and the Plaza been sold alone. Moreover, the government argued that a gift of the senior Cavanaughs' portion of the $700,000 was accomplished, without payment of gift taxes.

Defendant Baskes does not challenge the sufficiency of the evidence in this appeal. Rather, defendant contends: (1) the trial court erred in failing to dismiss the indictment or suppress evidence derived from certain illegal government conduct; (2) the government failed to disclose an understanding with two key prosecution witnesses; (3) the trial court erred in refusing to require the government to disclose the scope of its intended cross-examination of defendant's proposed character witnesses; (4) the trial court unduly restricted cross-examination of a key witness; (5) the trial court erred in failing to instruct the jury on the essential elements of the conspiracy charge; and (6) he was denied his right to a fair trial by the admission of substantial evidence outside the charged conspiracy. We affirm.

II. *Illegally Seized Evidence*

We first note that this court delayed the decision in this case pending a Supreme Court decision in *United States* v. *Payner*. The Supreme Court recently issued its opinion. 48 U.S.L.W. 4829 (June 23, 1980). At issue in *Payner* was the effect of the government's illegal conduct in seizing certain documents from a briefcase belonging to Michael Wolstencroft, which were introduced at defendant Payner's trial to help convict him. The Court held that Payner lacked standing to suppress the documents under the fourth amendment and "the supervisory power does not authorize a federal court to suppress otherwise

admissible evidence on the ground that it was seized unlawfully from a third party not before the court." *Id.* at 4830-31.

Here, documents seized at the same time as the documents in *Payner* from the same briefcase allegedly led the government to prosecute defendant Baskes. The Supreme Court's decision in *United States* v. *Payner* is dispositive of defendant's contention in this case that because of the illegal seizure of evidence the indictment should be dismissed or other action taken to avoid the taint.

III. *Alleged Failure to Disclose Promise of Leniency*

Defendant contends that the government's failure to disclose a promise of leniency made to two key prosecution witnesses in exchange for testimony requires a new trial.

The government's case against defendant Baskes depended extensively on the testimony of John E. Cavanaugh, Jr. and William Thornton. During the direct testimony of both witnesses the government asked whether they had received any promises in exchange for their testimony. Both witnesses replied they had not. In addition, Thornton was asked whether he asked for or received any immunity, to which he again responded that he had not.

Following the jury verdict, at a post-trial hearing held on defendant's motion to suppress certain evidence, the prosecution called Bernard Schoenberg, an attorney representing Cavanaugh, Jr. and Thornton, to testify. On cross-examination Schoenberg testified that he would do everything in his power to prevent a criminal case from being directed at his clients. Schoenberg testified that, although the government told him his clients were not then the target of any investigation and he believed his clients had a complete defense to any fraud charge, he stated to the

government that his clients would not furnish any statements or documents to the government until "this matter was resolved civilly in a way which would . . . my clients were willing to pay whatever tax they owed, that I wanted to resolve the matter civilly without penalties and we wanted to be left out and everything else."

Other evidence indicated that the government was not particularly interested in charging Cavanaugh, Jr. or Thornton. One agent thought that there was sufficient evidence to institute a civil fraud case against John Cavanaugh, Sr. and that the institution of civil fraud proceedings against the Cavanaughs was explored. Further evidence was introduced of a phone conversation between an Internal Revenue agent and a Department of Justice attorney in which the attorney stated that he "may" have to give the Cavanaugh group informal immunity. No charges were instituted against Cavanaugh, Jr. or Thornton.

Based on this evidence defendant argues that Cavanaugh, Jr. and Thornton falsely answered that they had never been promised leniency or immunity in return for their testimony and thus they are entitled to a new trial based on *Giglio* v. *United States,* 405 U.S. 150 (1972). In *Giglio* the Supreme Court held that a convicted defendant is entitled to a new trial if he can establish that the government failed to correct materially false testimony relevant to the credibility of a key prosecution witness at the trial, including evidence of a promise or agreement concerning a future prosecution between the witness and the government. *Id. See also United States* v. *Esposito,* 523 F.2d 242, 248 (7th Cir. 1975), *cert. denied,* 425 U.S. 916 (1976); *United States* v. *Harris,* 498 F.2d 1164, 1168 (3d Cir.), *cert. denied,* 419 U.S. 1069 (1974).

In the present case the defendant has not established the required undisclosed agreement of leniency.[3] Defendant has not offered any direct evidence of promises of leniency in exchange for testimony. Instead, defendant asks us to infer promises from Schoenberg's hope that his clients could, if necessary, avoid exposure to criminal or civil fraud proceedings by disclosing what they knew of the transactions. Such a hopeful expectation even when supplemented by evidence that a government attorney used language concerning the possibility of granting informal immunity is not sufficient to warrant a new trial under the rationale of *Giglio*. *See United States* v. *Ramirez* 608 F.2d 1261, 1266-67 (9th Cir. 1979); *United States* v. *Piet*, 498 F.2d 178, 182 (7th Cir.), *cert. denied*, 419 U.S. 1069 (1974). The situation is too equivocal to deem the witnesses' answers false and the government under a duty to correct or qualify them.

IV. *Court's Refusal to Require Disclosure of Intended Cross-Examination*

Defendant argues that the district court erred in not compelling the government to disclose the specific instances of defendant's conduct which it intended to use in cross-examination of defense character witnesses, prior to the time they were to testify. As a result, defendant claims he was forced to withhold significant character testimony rather than risk its impeachment by undisclosed and unverified conduct.

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[3] In cases in which courts have ordered a new trial based on *Giglio* v. *United States*, 405 U.S. 150, an undisclosed agreement of leniency between the government and the witness prior to the testimony was clearly established. *See Giglio*, 405 U.S. at 152-53; *Compbell* v. *Reed*, 594 F.2d 4, 7 (4th Cir. 1979); *United States* v. *Butler*, 567 F.2d 885, 888 (9th Cir. 1978); *United States* v. *Harris*, 498 F.2d 1164, 1169 (3d Cir.), *cert. denied*, 419 U.S. 1069 (1974); *United States* v. *Gerard*, 491 F.2d 1300, 1304 (9th Cir. 1974).

We find no rule which mandates such disclosure. This circuit requires the trial judge to consider the truth of the basis for impeaching questions prior to cross-examination of a character witness. *United States* v. *Jordan*, 454 F.2d 323, 325 (7th Cir. 1971).[4] However, the purpose of the inquiry is to prevent improper questioning which might have a prejudicial impact on the jury and which cannot be adequately cured by instructions. Disclosure is merely ancillary to verification of the conduct to be incorporated in the questions. No rule or rationale guarantees the defense advance knowledge of legitimate impeachment before it calls a witness.

The scope of character testimony is generally left to the discretion of the trial court since it is in the best position to consider the context in which it is to be presented.

> [C]ourts of last resort have sought to overcome danger that the true issues will be obscured and confused by investing the trial court with discretion to limit the number of [character] witnesses and to control cross-examination. Both propriety and abuse of hearsay reputation testimony, on both sides, depend on numerous and subtle considerations difficult to detect

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[4] We note that there is some conflict among the circuits on this issue. *Jordan* was decided on the basis of *Gross* v. *United States*, 394 F.2d 216, 223 (8th Cir. 1968), *on appeal after new trial*, 416 F.2d 1205 (8th Cir. 1969), *cert. denied*, 397 U.S. 1013 (1970). However, the Eighth Circuit has since drawn into question its holding in *Gross*. *Mullins* v. *United States*, 487 F.2d 581 (8th Cir. 1973). In *Mullins* the Eighth Circuit found that the propriety of impeaching questions need not be decided "either before trial or before questioning if the matter is satisfactorily resolved during trial." *Id.* at 588.

> or appraise from a cold record, and therefore rarely and only on clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts on this subject. [Footnote omitted.]

Michelson v. *United States,* 335 U.S. 469, 480 (1948). Among these considerations are concerns for fairness and efficiency as they emerge from the conduct of the trial. Normally the judge will be free to exercise his discretion in weighing these concerns and deciding when to rule on a specific issue.

Accordingly, we find no abuse of discretion in the trial court's refusal to rule on the scope of cross-examination without benefit of having heard the direct testimony. While there may be some advantages to deciding the matter before the witnesses take the stand, there are also compelling reasons for waiting to hear them first. "[U]nless the judge has a grasp of how much ground has been . . . traversed by the offering on good character, he cannot define the ground which the cross-examination may cover in attempting to discredit that testimony." *United States* v. *Lewis,* 482 F.2d 632, 644 (D.C. Cir. 1973). The trial court must decide for itself when it has enough information to make a proper ruling. While the court had much of the information found lacking in *Lewis,* we cannot find it unreasonable in having required more, particularly in light of the absence of prejudice to defendant's right to prior consideration.

The defense asked for a ruling on this issue at the close of the government's case. While the court declined to rule at that time, it made it clear that it would fully consider the matter after a witness had testified and before the cross-examination began. Furthermore, it indicated that this consideration would take place outside

the hearing of the jury. Given these precautions, the defendant would have been amply protected from the likelihood of improper questioning of his witnesses. The decision by the defense to withhold character testimony was freely made and based on no greater risk than that inherent in all trial proceedings. The defendant is bound by the consequences of that decision.

V. *Restrictions on Cross-Examination*

The defendant next claims that the trial court erred in refusing to permit him to ask a question of a key prosecution witness.

Alan Hammerman, an attorney practicing in the same law firm as the defendant, was named in the indictment as a co-conspirator. At the government's request, Hammerman was severed for trial from defendant with the understanding that if Hammerman testified consistently with a prior statement his indictment would be dismissed. Hammerman testified that he worked under defendant's supervision in structuring and implementing the Cavanaugh transaction and he also testified to various aspects of the sales transaction.

On cross-examination defendant's counsel asked Hammerman:

> Mr. Hammerman, did you unlawfully, knowingly and wilfully conspire to defraud the United States together with Sam Zell, Roger Baskes and/or Burton Kanter?
>
> Mr. Hammerman, did you unlawfully, knowingly and wilfully combine and agree together with Roger Baskes, Burton Kanter and Sam Zell to defraud the United States of America?

The trial court sustained the prosecution's objection to these questions. Basing his argument on Rule 704 of the Federal Rules of Evidence and *United States* v. *Standard Oil Co.*, 316 F.2d 884 (7th Cir. 1963), defendant asserts that such refusal is reversible error.

We find that in prohibiting cross-examination as to the legal implications of what occurred, the trial court did not abuse its discretion. Under Rule 701 of the Federal Rules of Evidence a witness, not testifying as an expert, is limited in testimony in form of opinions and inferences to those opinions which are "helpful to a clear understanding of his testimony or the determination of a fact in issue." Fed. R. Evid. 701(b); *Stoler* v. *Penn Central Transportation Co.*, 583 F.2d 896, 898-99 (6th Cir. 1978). When, as here, a witness is asked whether the conduct in issue was "unlawful" or "wilful" or whether the defendants "conspired," terms that demand an understanding of the nature and scope of the criminal law, the trial court may properly conclude that any response would not be helpful to the trier of fact. The witness, unfamiliar with the contours of the criminal law, may feel that the legal standard is either higher or lower than it really is. If either event is true the jury may accord too much weight to such a legal conclusion. In addition, in this case the trial court permitted the defendant to extensively cross-examine Hammerman concerning his involvement in the transaction. Defendant does not complain that he was unable to question Hammerman as to any factual matter, only that he could not ask Hammerman about the legal implications of the conduct. The limitation on the cross-examination was not an abuse of dis-

cretion.[5] *See Stoler* v. *Penn Central Transportation Co.*, 583 F.2d at 898-99; 3 Weinstein & Berger, *Weinstein's Evidence*, ¶ 701[02], at 701-13-701-17 (1978).

Defendant argues that under Rule 704 of the Federal Rules of Evidence testimony in the form of an opinion is not objectionable because it embraces an ultimate issue in the case and thus the district court erred in limiting cross-examination. Rule 704 abolished the ultimate issue objection, which had prohibited witnesses from expressing opinions upon ultimate issues. The purported purpose of the former rule—to prevent witnesses from "usurping the province of the jury"—had been deemed "empty rhetoric." Advisory Committee's Note on Rule 704 (quoting 7 Wigmore, *Evidence*, § 1920, at 17 (3d ed. 1940)). Rule 704, however, does not provide that witnesses' opinions as to the legal implications of conduct are admissible. *See United States* v. *Scavo*, 593 F.2d 837, 844 (8th Cir. 1979). The Rule specifically provides that testimony must be "otherwise admissible," and here we have found that the trial court did not abuse its discretion in concluding that the testimony was not otherwise admissible. It is not claimed that there had been any direct testimony which made these questions proper solely as cross-examination.

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[5] Defendant relies on *United States* v. *Standard Oil Co.*, 316 F.2d 884 (7th Cir. 1963), for his claim that the refusal to permit the cross-examination is error. In *Standard Oil*, a price-fixing conspiracy case, this court found that the trial court committed error in not permitting defense witnesses to answer questions as to whether there had been an "agreement," "understanding," "promise," or "commitment," concerning prices. *Id.* at 889-90. Unlike the situation here, those words have well-established lay meanings and do not demand a conclusion as to the legal implications of conduct.

VI. *Failure to Tender Conspiracy Instruction*

Defendant next argues that the trial court erred in failing to give the jury adequate instructions on the essential elements of the conspiracy charge. While it is conceded that the court explained what was required for proof of conspiracy, defendant contends he was entitled to an instruction which clearly identified the specific elements as essential to a finding of guilt. Error is premised on the court's inadvertent omission of the precise language of an instruction previously agreed upon by the court and both counsel.[6]

It is settled law that jury instructions should be considered in their entirety and not judged in "artificial isolation." *United States* v. *Brown,* 518 F.2d 821, 826 (7th Cir.), *cert. denied,* 423 U.S. 917 (1975). While the court did not recite the elements of a conspiracy in the agreed upon form, all elements were incorporated in a lengthy discussion of the terms of the indictment and the applicable law. As we noted in *United States* v. *Barclay,* 560 F.2d 812, 817 (7th Cir. 1977), omission of a formal instruction on a particular element may sometimes be alleviated where the element is fully defined in other terms and its applicability to the case is clear.

The thrust of defendant's argument is that the trial court obscured the elements of the charge by providing such a lengthy explanation and failing to reduce the terms to a simple formula. While a summary instruction may have aided the jury's understanding, we cannot find that they were anything but fully informed of the elements of

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[6] The agreed upon instruction was borrowed from 2 Devitt & Blackmar, *Federal Jury Practice and Instructions,* § 27.08, at 25-26 (3d ed. West 1977).

the charge. The jury was told what constituted a conspiracy and that its various elements must be proven beyond a reasonable doubt. The instructions were not incomplete, nor did they contain misleading information. In view of the parties' agreement the omission was unfortunate, but we are not persuaded that the omission was reversible error.

VII. *Admission of Evidence of Mining Claim Outside Charged Offense*

The final issue is whether the trial court properly permitted the government to introduce evidence concerning the ownership of the mining claim subsequent to the sale of the claim by the Cavanaughs to Zell. The objected-to-evidence involved the transfer of the claim from Zeno, N.V. to Hornet Mining, Inc. in exchange for stock; the sale of the claim to Tonopah Vein which was 99% owned by Fantasy-Galaxy, a partnership to whom defendant was tax counsel, which sale resulted in a subsequently disallowed $153,000 partnership loss on account of prepaid interest for Fantasy-Galaxy; and the subsequent dissolution of Fantasy-Galaxy and the transfer of its assets to Argosy Venture, a Bahamian partnership. Defendant objected to the introduction of this evidence as beyond the scope of the indictment, irrelevant, an attempt by the government to infer additional illegal acts, and evidence of a separate conspiracy which violated the multiple conspiracy rule.

The trial court initially instructed the jury that the Fantasy-Galaxy evidence should only be considered for the purpose of showing the subsequent history of the mining claim. The court also warned that the defendants were only on trial for the acts charged in the indictment. While deliberating, the jury submitted a written question to the

judge asking him to clarify his instruction concerning Fantasy-Galaxy. After discussion with the parties, the court added the further instruction that the Fantasy-Galaxy evidence "may be considered by you only to the extent, if at all, you find such subsequent history bears on the intent and purpose of the defendants in the use of . . . this mining claim in the Cavanaugh transaction."

We note that the fact that evidence is offered of events which occurred prior or subsequent to those charged in the indictment does not make the evidence objectionable. *United States* v. *Fairchild,* 526 F.2d 185, 188-89 (7th Cir. 1975), *cert. denied,* 425 U.S. 942 (1976); *United States* v. *O'Connor,* 433 F.2d 752, 754-55 (1st Cir. 1970), *cert. denied,* 401 U.S. 911 (1971). Evidence of other events is not admissible, however, "to prove the character of a person in order to show that he acted in conformity therewith." Fed. R. Evid. 404(b). Such evidence is admissible for other purposes such as proof of intent, knowledge, motive, and preparation. Fed. R. Evid. 404(b). In this case evidence concerning the subsequent ownership of the mining claim was probative of defendant's intent and knowledge.[7]

Intent is an essential element of the crime with which defendant was charged. Baskes' knowledge was also important because one of his defenses was that he relied on Cavanaugh as to valuation of the claim. Both parties

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[7] Defendant Baskes in his reply brief argues that the subsequent transfers of the mining claim were not substantially similar to the Cavanaugh transaction and thus they were not admissible. The degree of similarity is relevant, however, only insofar as the acts are sufficiently alike to support an inference of criminal intent. *United States* v. *O'Brien,* 618 F.2d 1234, 1238 (7th Cir. 1980); *United States* v. *McPartlin,* 595 F.2d 1321, 1343 (7th Cir.), *cert. denied,* 444 U.S. 833 (1979). Here, involving as it does the same mining claim and occurring soon after the Cavanaugh sale, the evidence is sufficiently connected to the charged acts.

have agreed that the value of the mining claim was crucial to the unlawfulness of the transaction. Other evidence at trial was offered to establish that the claim was nearly worthless. Evidence of the subsequent shuffling of the ownership of the worthless claim to different entities, both foreign and domestic, and for different consideration, all pursuant to the counsel of the defendant's law firm, is not only relevant, but persuasive, in demonstrating Baskes' knowledge that the claim was worthless and his intent to use it as an apparently valuable asset to accomplish a tax result.[8]

Defendant further argues, however, that the probative value of this evidence was outweighed by its prejudicial effect and thus it should be excluded under Rule 403 of the Federal Rules of Evidence. He contends that additional illegalities could be inferred from the evidence and that the complicated nature of the transaction might confuse the issue and mislead the jury.

Under Rule 403 the balancing of probative value and prejudice is committed to the sound discretion of the trial judge and we are obligated to give great deference to the evidentiary ruling of the trial court. *United States* v. *Watson,* No. 79-2337, at 7 (7th Cir., June 11, 1980); *United*

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[8] Baskes objects on appeal to the introduction of evidence concerning litigation between Fantasy-Galaxy and the Internal Revenue Service involving the purchase of the mining claim by a partnership, 99% of which was owned by Fantasy-Galaxy. In the purchase Fantasy-Galaxy claimed a $153,000 prepaid interest deduction. As a product of litigation, Fantasy-Galaxy agreed to pay back the $153,000 prepaid interest deduction. Baskes claims Rule 408 of the Federal Rules of Evidence makes such evidence inadmissible. Regardless of the merits of Baskes' argument his failure to object to evidence of the settlement at trial means such objection has been waived. Fed. R. Evid. 103(a)(1).

States v. *O'Brien,* 618 F.2d 1234, 1238-39 (7th Cir. 1980). Examining the record, we do not believe the trial court abused its discretion in admitting the evidence.

The district court told the jury that the evidence of the subsequent history of the mining claim could only be used for the purpose of establishing the defendant's intent. Given the importance of this evidence, its undisputed and proximate character, and the qualification on the purposes for which it was admitted, the trial court did not abuse its discretion in admitting it. *See United States* v. *Brunson,* 549 F.2d 348, 359-60 (5th Cir. 1977).

Defendant further argues that the admission of the challenged evidence violated "the multiple conspiracy rule of *Kotteakos* v. *United States,* 328 U.S. 750 (1946)." We are at a loss to apply *Kotteakos* to this case.

Defendant contends, apparently, that the "other acts" evidence establishes a conspiracy distinct from the one charged. Assuming that is true, the balancing process under Rule 403, is still the test. *Kotteakos* was a case where a single conspiracy was charged, but not proved, although there was evidence of several, related only through a common member. Here the indictment charged one conspiracy and there was evidence tending to prove it. The fact that further evidence relevant to intent may also have proved a distinct and subsequent conspiracy does not change the character of the balancing process under Rule 403.

The judgment appealed from is affirmed.

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

December 23, 1980.

Before

Hon. Thomas E. Fairchild, Chief Judge

Hon. Howard T. Markey, Chief Judge*

Hon. William J. Bauer, Circuit Judge

No. 77-2178

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

v.

ROGER S. BASKES, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76-CR-585—Bernard M. Decker, *Judge.*

ON PETITION FOR REHEARING

In his petition for rehearing, defendant asserts that we erred in stating that "[r]egardless of the merits of Baskes' argument [under FRE 408] his failure to object to the evidence of the settlement at trial means such objection has been waived.'"[1] We

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* The Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

[1] See footnote 8 of our opinion in *United States* v. *Baskes,* No. 77-2178 (decided September 18, 1980).

have reviewed the record generally and specifically the pages cited to us by defendant to check this assertion and find no indication that an objection was made on the ground that the evidence constituted inadmissible proof of a civil compromise.

The government, moreover, in its answer to the petition, claims that no evidence of the settlement was ever communicated to the jury. Our examination of the transcript shows this to be correct.

No member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of defendant-appellant for a rehearing in the above mentioned appeal be, and the same is hereby denied.